EMPLOYMENT TRIBUNALS

Claimant: Mr P Bitakaramire

Respondents: LTE Group and others

JUDGMENT

The claimant's second application dated 29 July 2024 for reconsideration of the judgment sent to the parties on 14 June is refused.

REASONS

Introduction

1. Employment Judge Cookson has considered the application sent by the claimant for reconsideration set out in an attachment to the claimant's email of 29 July 2024 which refers to the written reasons given for the judgment in this case.

2. The reconsideration request runs to some 7 pages and raises a number of issues, but the key ground appears to be that the claimant considers that the conclusion that he had not made a protected disclosure was wrong because of *"the deafening silence of those written reasons on the "is likely to be endangered" clause of s43(1)(d) of the Employment Rights Act 1996"*. The claimant asserts that the Tribunal showed *"an inexplicable failure to take into account the likely future impact on the claimant's mental health that is mooted by the "is likely to be endangered" clause in s43(1)(d)".*

3. EJ Cookson has concluded that there is no reasonable prospect of the original decision being varied or revoked. She has reached that decision for the reasons set out below.

The Law

4. Under rule 70 of the Employment Tribunal Rules of Procedure, a judgment will only be reconsidered where it is 'necessary in the interests of justice to do so'. This does not mean that in every case where a litigant is unsuccessful, he or she is automatically entitled to a reconsideration: it is likely that most unsuccessful litigants think that the interests of justice require the decided outcome in their cases to be reconsidered. Instead, a Tribunal dealing with the question of reconsideration must seek to give effect to the overriding objective to deal with cases 'fairly and justly' — rule 2. This includes:

    a. ensuring that the parties are on an equal footing;

    b. dealing with cases in ways which are proportionate to the complexity and importance of the issues;

    c. avoiding unnecessary formality and seeking flexibility in the proceedings;

    d. avoiding delay, so far as compatible with proper consideration of the issues; and

    e. saving expense.

5. In *Outasight VB Ltd v Brown* 2015 ICR D11, EAT, Her Honour Judge Eady KC accepted that the wording 'necessary in the interests of justice' in rule 70 allows Employment Tribunals a broad discretion to determine whether reconsideration of a judgment is appropriate in the circumstances. However, this discretion must be exercised judicially, *'which means having regard not only to the interests of the party seeking the review or reconsideration, but also to the interests of the other party to the litigation and to the public interest requirement that there should, so far as possible, be finality of litigation*'.

6. The law in relation to s43B of the Employment Rights Act is set out in the written reasons.

Application in this case

7. In brief terms the reason why it was concluded that the claimant had not made a protected disclosure was the conclusion that the claimant could not reasonably believe that his disclosure tends to show that the health and safety of an individual has been, is being or is likely to be endangered.

8. The claimant asserts that the judgment was flawed because the Tribunal failed to take account of the future risk of health and safety being endangered but that is not correct. The reasons explaining the decision reflected the way the issues were framed and presented at the hearing.

9. The relevant section in the email which is said to be the protected disclosure says this

"I've just received a phone call from Luke Webster at Reed. Luke informed me that Jenny Barnard has made a complaint to him about the email chain below. Her objections seem to rest on the use of the word 'needlessly' and the phrase 'no discernible reason'.

It's worth your knowing that at no time since the two emails that appear to be the subject of Jenny's brooding resentments has she once had a conversation with me about them. Not once. To the contrary, she greets me with a smile each time she sees me and gives the impression that all is well between us.

This is a sociopathic and abnormal set of behaviours on her part that are creating a toxic working relationship about which I can no longer remain silent.

Luke, for his part, has informed me that it is perfectly normal for Jenny to communicate her resentment to him without once raising them with me since Reed, not Manchester College, is my employer. That too is questionable, and I've taken the liberty of copying into this email Luke's own managers at Reed for their clarification."

10. At the hearing the claimant conceded in cross-examination that there is no explicit reference to particular injury or harm in the disclosure email. The respondent submitted that this meant that the claimant had not shown that he could reasonably believe his disclosure tended to show that health and safety had been or was being or was likely to be endangered. In response the claimant argued that the email had to be read in the context of what he said were communications between individuals working in mental health.

11. In his reconsideration application the claimant criticises what is recorded in the written reasons about that because he says he did not insist that any particular context was to be applied. This section of the written reasons was included to explain how the claimant's arguments about context had been considered. A disclosure of information may usually be expected to be reasonably explicit about the relevant failure being referred to. The Tribunal accepted the claimant's argument that a disclosure of information in a particular field of work or expertise may reasonably assume a certain level of knowledge or understanding on the part of the person receiving the disclosure. However, it was still concluded that the claimant could not reasonably believe that the information he had disclosed in the particular email in question tended to show past, present or future endangerment to health and safety through an endangerment to mental health as alleged.

12. In the reconsideration application the claimant says that his concern is rather obviously about the *"stress he is likely to face in any future dealings with a*

person with whom he has been misled into believing that all was well only to discover that she is nursing grievances against him all along and making complaints about him to third parties without his knowledge." The Tribunal did not and does not accept that the claimant could reasonably believe that the information included in the email tends to show that risk of future stress in the sense of that meaning the health and safety of an individual has been, is being or is likely to be endangered.

13. The argument set out in the reconsideration application is essentially the same as was made at the hearing. The claimant argues that by referring to a "toxic working relationship" and "sociopathic and abnormal behaviours" in his email it must have been obvious that he was referring to a future risk of endangerment to mental health. Those submissions were considered carefully at the hearing but were rejected.

14. To be clear, if the claimant had used the word "toxic" in the sense to mean poisonous – for example if he had suggested his workplace was being affected by a toxic gas or substance, the Tribunal would accept that he had made a disclosure where the risk of endangerment to health and safety, past present or future, was so obvious it need not be explained further to tend to show a relevant failure in terms of s43B. However, in this case the matter which is said to be a disclosure about a risk to health and safety being endangered or being likely to be endangered is referred to in the first two paragraphs of the email.

"I've just received a phone call from Luke Webster at Reed. Luke informed me that Jenny Barnard has made a complaint to him about the email chain below. Her objections seem to rest on the use of the word 'needlessly' and the phrase 'no discernible reason'.

It's worth your knowing that at no time since the two emails that appear to be the subject of Jenny's brooding resentments has she once had a conversation with me about them. Not once. To the contrary, she greets me with a smile each time she sees me and gives the impression that all is well between us."

15. In the context of that disclosure of information, the word "toxic" is clearly being used in a more colloquial sense to mean highly unpleasant. The reference to "sociopathic" and "abnormal" are also being used in the same way. As the written reasons explain, it is clear to the Tribunal that the claimant objected in strong terms to Ms Barnard's behaviour. It was not accepted that the use of the words "toxic" "sociopathic" and "abnormal" in the context of the disclosure about the behaviour which offended him, without any reference to the particular impact on the claimant, meant that the risk, past present or future, was so obvious nothing more needs to be said for the claimant to reasonably believe that the email tended to show his health and safety was being endangered or might be endangered in the future.

16. It was explained in the extemporary judgment itself and in the written reasons, that to qualify as a protected disclosure the question is not whether an individual believed or reasonably believed in a relevant breach or the future risk of a relevant breach. The question is whether the disclosure of information tended to show that belief. The submissions at the time and the contents of this reconsideration application suggest that perhaps the claimant does not recognise the significance of that. Tellingly the claimant says *"can there truly be any question in any judge's mind that the Claimant genuinely harboured a reasonably held belief that his relationship with Ms. Barnard had been impaired by her conduct such that any future dealings with this particular manager were "likely to be" stressful to his mental health were he to have continued to serve on her team?"*. That was not the question for the Tribunal. The Tribunal was not concerned with what was in the claimant's mind about his relationship with Ms Barnard, but rather what he could reasonably believe about what the information he set out in his email tended to show.

17. At the hearing the claimant also argued that the risk to health and safety must be obvious because the email he referred to had obviously been written by someone in distress. Whether that can be said about the email was considered because it was something the claimant himself volunteered as a relevant issue of context. However it was not accepted that it is obvious that the writer was in distress. The written reasons explain why that submission was not accepted.

18. The claimant also appears to seek reconsideration on other grounds – essentially alleging bias and prejudging of the outcome or other impropriety by the Tribunal. There is significant overlap in the matters relied on in this regard in this application for reconsideration and the one previously made. The claimant is also critical of the Tribunal dealing with issues raised by him in the course of his oral submissions. Quite simply in the written reasons the Tribunal had sought to explain why it rejected submissions made by the claimant. It does not mean these were matters which heavily influenced the decision of the Tribunal – rather it was simply an attempt to explain to the claimant why arguments he had made at the hearing had not been accepted.

19. It is clear that the claimant hopes that if the hearing of 14 June was to be held again, he could achieve a different outcome. That is how unsuccessful litigants often feel about hearings which have not gone in their favour, but it is not a reason for the judgment to be reconsidered in the interests of justice because the interests of justice must also take into account the interests of the respondent and the public interest requirement that there should, so far as possible, be finality of litigation.

20. In the circumstances it is concluded there is no reasonable prospect of the original decision being varied or revoked if the judgment were to be reconsidered.

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Employment Judge Cookson

Date: 13 September 2024

JUDGMENT AND REASONS SENT TO THE PARTIES ON

Date: 20 September 2024

FOR THE TRIBUNAL OFFICE